Petition

Office-Supreme Court, U.S.
FILED
AUG 28 1981
ALEXANDER L. STEVAS,
CLERK

81-414

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

GUISEPPE TROIA,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SPIROS A. TSIMBINOS
Attorney for Petitioner
125-10 Queens Boulevard
Kew Gardens, NY 11415
(212) 699-6110

(11347)

QUESTIONS PRESENTED FOR REVIEW

Question 1:

Were the Petitioner's Constitutional rights to a fair trial and due process of law abridged by the court below in its charge to the jury that an inference could be drawn against the Petitioner from the unexplained possession of large amounts of cash?

Question 2:

Was the Petitioner's Constitutional right to testify under the Sixth Amendment abridged by the imposition of an additional sentence by the court below based upon the court's determination that perjury had been committed during the trial?

LIST OF PARTIES

The parties to the instant

proceedings are Giuseppe Troia, Petitioner, and the United States of America, as Respondent. In the court below, a consolidated appeal was held with co-defendants, Elizabeth Leal and Salvatore Fincato.

TABLE OF CONTENTS

	Page
Questions Presented For Review	i
Table of Authorities	iv
Opinions Below	2
Jurisdictional Grounds	2
Constitutional Provisions	3
Statement of the Case	3
Conclusion	15
APPENDIX A - Charge of the Trial Judge With Respect To Question One.	1a
APPENDIX B - Decision of Judge Mishler With Respect to Question 2.	3a
APPENDIX C - Order and Decision of the Court Below Rendered June 29, 1981.	6a

TABLE OF AUTHORITIES

CASES CITED

	Page
People v Galletti, 55 A.D.2d 154, 156 (2nd Dept. 1976)	8
U.S. v Grayson, 438 US 41 (1978)	11,15
U.S. v Hendrix, 505 F2d 1233 (2d Cir. 1974)	11
U.S. v Mangan, 515 F2d 32 (2d Cir. 1978)	9
U.S. v Williams, 168 US 382 (1897)	6,7,10

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

NO.

GIUSEPPE TROIA,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable The Chief Justice, and Associate Justices of the Supreme Court of the United States:

OPINIONS BELOW

The opinion of the Hon. Jacob Mishler with respect to the issues presented are not officially reported, but are reproduced herein in Appendix B. The opinion of the United States Court of Appeals for the Second Circuit has not yet been officially reported, but is reproduced herein in Appendix C.

JURISDICTIONAL GROUNDS

The order of the United States Court of Appeals for the Second Circuit affirming the petitioner's conviction was entered on June 29, 1981. The petitioner is, therefore, timely filing this application for a Writ of Certiorari and the jurisdiction of this Court is invoked pursuant to Title 28 U.S.C. §1254.

CONSTITUTIONAL PROVISIONS

Constitutional provisions involved in this case are the Fifth and Sixth Amendments to the United States Constitution.

STATEMENT OF THE CASE

In the case at bar, the petitioner was found guilty, after a trial by jury, of the crimes of Conspiracy to Import a Controlled Substance, Importation of a Controlled Substance, and Attempted Possession of a Controlled Substance, to wit: heroin, under §§952(a), 960(a), 963 and 846 of Title 21 of the United States Code, and was sentenced to terms of ten (10) years on each of the counts to run concurrently.

During the cross examination of the Petitioner Troia, the prosecutor

brought out that the Petitioner had paid $12,500 in cash for his automobile in May or June of 1980, some two months prior to the date of the alleged conspiracy, and that he had also paid some $3,500 in cash for the airplane tickets in August of 1980 for himself and his family (T*/ 587,588,784). During her summation the Assistant United States Attorney argued to the jury that "These amounts represented considerable expenditures of monies" (T 955) and told them:

> "Do you think maybe he has another line of business? Like narcotics trafficking." (T 956).

During his testimony the petitioner acknowledged that he had made the cash payments but testified that he was a co-owner of a large family-owned butcher shop business in which

*/ T refers to minutes of trial.

large amounts of cash were taken in (T 534). He specifically testified that the cash used to pay for the car and tickets came from his butcher shop business (T 785).

Despite the appellant's explanation of the source of the cash, and the total failure of the prosecutor to connect the cash in any way to the illegal activity alleged in the indictment, the court below charged the jury that they could draw an inference as to the appellant's guilt from the testimony regarding the cash. The court specifically charged on the issue:

> "In this case Mr. Troia testified that he paid $12,500 in cash for the purchase of a Mercedes Benz about six months ago at a cost of approximately $23,000 and that sometime in or about August of 1980 he paid approximately

approximately $3,500 in cash for airline tickets to Italy. Mr. Troia testified that he and his brother operate a butcher shop and that the butcher shop takes in substantial amounts of cash in their business. Mr. Troia, Sr. testified that the butcher shop has many employees and does a large retail business. The jury may infer from the unexplained possession of large amounts of cash that the cash is the proceeds of illegal transactions. You decide whether the testimony concerning the cash that comes through the business of the butcher shop explains the large amount of cash. If it does not, then you may, it is not mandatory, you may infer from the possession of large amounts of cash that is not explained that that cash came from an illegal source or sources". (T1145;

At the conclusion of the court's charge, defense counsel for Troia excepted to the court's charge given on this point (T 1168).

In United States v Williams,

168 US 382 (1897) this Court disapproved of the use of evidence showing that the defendant had made bank deposits during the time he was accused of extortion counts. This Court there specifically stated at page 396:

> Upon the face of the transactions referred to there was no necessary connection between the deposits and the specific charges against the defendant. And yet the jury were in effect told that the failure of the accused to explain how he came by those sums, aggregating nearly five thousand dollars, was a circumstance tending to show that if he had given that explanation it would have operated to his prejudice in meeting the particular charges against him, of extorting at one time $100, and at another $85, under color of his office. There was no such connection shown between the possession by the defendant of the sums specified in the affidavit and bank books, and the alleged extortion by him of two named sums from certain persons, under color of his office, as required him to explain how he acquired the moneys referred

> to in the affidavit and bank books. The manifest object and the necessary effect of this evidence was merely to give color to the present charges, and to cause the jury to believe that the accused had in his possession more money than a man in his condition could have obtained by honest methods, and, therefore, he must be guilty of extorting the two sums in question".

In the case at bar, the prosecution established no connection or nexus between the cash and illegal activity.*/ Further, the petitioner testified and explained that the cash came from a legitimate source, his butcher

---

*/ In People v Galletti, 55 A.D.2d 154, 156 (2nd Dept. 1976) the Appellate Division reversed a conviction where evidence of cash found at the time of arrest was introduced. The Court held "There was no showing that the cash or the deposits reflected in the bank books found in her bag was in any way connected with the alleged sale.

shop business. Also, the amounts involved were not of the size indicative of the "tools of drug trafficking". See, for example, United States v Mangan, 575 F.2d 32 (2nd Cir. 1978). All of these factors make it clear that the court below improperly charged that an inference could be drawn against the petitioner on this issue.

By its charge, the court diverted the jury's attention from the central issue of the petitioner's guilt of the crime alleged in the indictment and interjected material with a high degree of potential for prejudice. The evidence of the cash payments had a slight probative value and a high degree of prejudice. The court's elevation of the testimony

to the level of an inference which could be used to determine guilt was clearly improper and denied the petitioner a fair trial.

Since this Court's decision in Williams, Supra, several Federal Courts of Appeals have deviated from the holding in that case.*/ This Petition offers this Court a unique opportunity to reaffirm its position on this issue.

Also in the case at bar, the sentencing judge specifically added two years to the sentence of the petitioner, Troia, upon his feeling

---

*/ See, United States v Tramunti, 513 F.2d 1087 (2nd Cir. 1975); United States v Magnano, 543 F.2d 431 (2nd Cir. 1976); United States v Viserto, 596 F.2d 531 (2nd Cir. 1979)

that he had not testified truthfully.

Judge Mishler, in imposing sentence stated that he had concluded beyond a reasonable doubt that perjury had been committed, and that under the cases of United States v Grayson, 438 US 41 (1978) and United States v Hendrix, 505 F.2d 1233 (2nd Cir. 1974) he would consider this factor in imposing sentence. Defense counsel objected to the imposition of the additional sentence, citing Constitutional grounds and pointing out the lack of evidence to establish a finding of perjury beyond a reasonable doubt (S*/ 26, 34).

---

*/ S refers to the sentencing minutes.

In the case at bar, proof of the petitioner, Troia's guilt was slight, and there is no basis for a determination despite the jury verdict that the petitioner, Troia, did not testify honestly and truthfully. The petitioner, Troia, was tried on a conspiracy theory in a case where the prosecution relied upon prejudicial inferences to connect him to the illegal activity. The jury's verdict thus could have been based upon a variety of factors other than a determination of perjury. To rely upon a jury verdict as grounds for a finding of perjury, is a concept fraught with dangerous implications since the use of

such an argument will automatically subject a convicted person who testified to a conviction of perjury.

Although this Court, in United States v Grayson, 438 US 41 (1978) upheld the Constitutionality of a sentencing judge's consideration of a finding of perjury on the question of sentence, the Court in a sharply divided decision*/ recognized that careful limitations

*/ Justices Stewart, Brennan and Marshall dissented from the Court's opinion, indicating their strong feeling that to allow this practice would have a chilling effect on the exercise of the defendant's right to testify (see U.S. v Grayson, supra at pp 56-58). There also appears to be a sharp division of opinion on the issue among the various federal circuits.

See Scott v U.S., 419 F2d 264 (D.C. Cir. 1969), and Poteet v Fauver, 517 F2d 393 (3rd Cir. 1975), expressing disapproval of the practice, and U.S. v Nunn, 525 F2d 958 (5th Cir. 1976); U.S. v Levine, 372 F2d 70 (7th Cir.,

should be placed upon such a practice.

This Court thus stated at page 55:

> "Nothing we say today requires a sentencing judge to enhance in some wooden or reflex fashion the sentences of all defendants whose testimony is deemed false. Rather, we are reaffirming the authority of a sentencing judge to evaluate carefully a defendant's testimony on the stand, determined with a consciousness of the frailty of human judgment whether the testimony contained willful and material falsehoods".

Although Judge Misher concluded that perjury had been committed beyond a reasonable doubt, he offered

---

Footnote Cont'd. from previous page:

1963); Humes v U.S., 186 F2d 875 (10th Cir. 1951); U.S. v Wallace, 418 F2d 876 (6th Cir. 1969); U.S. v Moore, 484 F2d 1284 (4th Cir. 1973), expressing support for the practice.

no details to explain the basis for his determination nor does a review of the relevant testimony lend credence to his position.

It is respectfully submitted that the court below was incorrect in the imposition of a two year additional sentence based upon its unsupported conclusion. This petition offers this Court an opportunity to reconsider or to modify its previous holding in U.S. v Grayson.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

SPIROS A. TSIMBINOS
Attorney for Petitioner
Office & P.O. Address
125-10 Queens Boulevard
Kew Gardens, NY 11415
Telephone: (212) 699-6110

APPENDIX

APPENDIX A

CHARGE OF THE TRIAL JUDGE WITH RESPECT TO QUESTION ONE.

In this case Mr. Troia testified that he paid $12,500 in cash for the purchase of a Mercedes Benz about six months ago at a cost of approximately $23,000 and that sometime in or about August of 1980 he paid approximately $3,500 in cash for airline tickets to Italy. Mr. Troia testified that he and his brother operate a butcher shop and that the butcher shop takes in substantial amounts of cash in their business. Mr. Troia, Sr. testified that the butcher shop has many employees and does a large retail business. The jury may infer from the unexplained possession of large

amounts of cash that the cash is the proceeds of illegal transactions. You decide whether the testimony concerning the cash that comes through the business of the butcher shop explains the large amount of cash. If it does not, then you may, it is not mandatory, you may infer from the possession of large amounts of cash that is not explained that that cash came from an illegal source or sources. (T 1145).

APPENDIX B

DECISION OF JUDGE MISHLER WITH RESPECT TO QUESTION 2

Giuseppe Troia, the jury having found you guilty of Counts 1 and 2 of the Indictment, I sentence you to the custody of the Attorney General of the United States or his duly authorized representative, who shall choose a place of confinement for a term of ten years on Count 1.

On Count 2, I sentence you to a term of ten years. In addition thereto, I impose a special parole term of five years, said terms to run concurrently.

As I said to Mrs. Leal, I find that you committed perjury in almost every material respect in the testimony during the trial;

and I make that finding by proof beyond a reasonable doubt. And I would have sentenced you to eight years. But because of the perjury, I've imposed an additional two-year term. (S 38)

* * * * * *

MR. GREENBERG:*/ ...I join with Mr. Kunstler to this extent, that I think your Honor is wrong in assuming that this defendant lied when he took the stand. He told the court, he told the jury he knew nothing about it. As a matter of fact, nowhere in the records is his name, the shipment records or the communications, is he named anywhere in those records as being a person

*/ Petitioner's trial attorney.

that the merchandise was consigned to.

The fact that he was present with Miss Leal on the two days that the shipment came in and drove her around, that is the connection between himself and this drug trafficking. There is nothing else in the evidence, as I recall, that connects him with the drug trafficking.*/ (S 34, 35)

---

*/ Mr. Kunstler, attorney for the defendant Leal, had previously argued to the Court as follows:

"I think there is a Constitutional question involved in punishing someone with a two year additional sentence because they take the stand and your Honor doesn't believe them. I think that goes beyond the bounds of the sentencing power". (S26)

APPENDIX C

ORDER AND DECISION OF THE COURT BELOW RENDERED JUNE 29, 1981.

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty ninth day of June, one thousand nine hundred and eighty one.

PRESENT:

HON. WILLIAM H. TIMBERS
HON. THOMAS J. MESKILL,
Circuit Judges
HON. THOMAS F. MURPHY,
District Judge, Sitting
by Designation.

----------X

UNITED STATES OF AMERICA,

Appellee,

-against-

GIUSEPPE TROIA, ELIZABETH LEAL, and SALVATORE FINCATO,

Appellants.

----------X

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel for appellants, Leal and Troia, and taken on submission as to appellant Fincato.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgments of said District Court be and they hereby are affirmed.

Appellants Troia, Leal and Fincato were convicted following a jury trial in the Eastern District of New York of conspiring to import heroin into the

United States, 21 U.S.C. §963 (1976), importing eleven kilograms of heroin, 21 U.S.C. §952(a), 960 (1976), and attempting to possess heroin with the intent to distribute it, 21 U.S.C. §846 (1976). Appellants Troia and Leal each were sentenced to three concurrent 10 year prison terms and 5 years special parole. Appellant Fincato was sentenced to an 8 year prison term and 5 years special parole. This appeal has been taken from the judgments entered on the jury verdict.

First, we hold that the evidence, viewed in the light most favorable to the government, was sufficient to support the verdict convicting Troia. The evidence showed Troia's active participation in

appellants' efforts to secure delivery of the packages containing the heroin, and not merely an association between Troia and the other appellants, as he contends. United States v Steinberg, 525 F.2d 1126, 1134 (2 Cir. 1975). Neither the jury nor this Court is required to accept Troia's innocent gloss on the evidence proven at trial, especially in light of the independent evidence which supported the inference that Troia was a knowing participant. That included his well timed trips to Palermo, Sicily, the source of the drugs, and evidence that calls were made from his home to a number in Sicily identified with the heroin importation.

On a related question, we hold that Judge Mishler did not err in his

instruction to the jury regarding substantial cash expenditures made by appellant Troia. Evidence of the expenditures was received without objection. United States v Indiviglio, 352 F.2d 276 (2 Cir. 1965), cert. denied, 383 U.S. 907 (1966). Once the evidence was before it, the jury could infer that the money came from an illegal source if it found that appellant's use of the money was inconsistent with the "legitimate" explanation offered through Troia's testimony. United States v Ariza-Ibarra, 605 F.2d 1216, 1224-25 (2 Cir. 1979).

Appellants Troia and Leal both claim that the district court abused its discretion by augmenting their prison sentences on the basis of its

conclusion -- "beyond a reasonable doubt" -- that they committed flagrant perjury on the witness stand. It unquestionably was within Judge Mishler's discretion to consider the finding of perjury in evaluating whether appellants were likely to be receptive to rehabilitation. United States v Grayson, 438 U.S. 41 (1978). We reject Troia's contention that Judge Mishler could not have found beyond a reasonable doubt that Troia gave perjured testimony. In reviewing the record, we find ample evidence that Troia's efforts t put an innocent cast on his behavior were not only false but wholly incredible. We also reject appellant Leal's contention that Judge Mishler abused his discretion in considering only Leal's

perjury and refusing to consider other factors which might have mitigated the sentence. We find this argument to be unsupported by the record as a matter of fact. Leal was convicted of importing a substantial amount of heroin, yet was given a prison sentence substantially under the 15 maximum provided by statute. 21 U.S.C. §960 (1976). That clearly suggests that "mitigating factors" were not ignored. For this reason alone, the Fifth Circuit decision relied upon by appellant, United States v Robbins, 623 F.2d 418 (5 Cir. 1980), is inapposite.

Leal also contends that she was deprived of a fair trial because her counsel was not allowed to cross-

examine Drug Enforcement Administration agents about Salvatore Gallina and his possible involvement in illegal narcotics in general and this crime in particular. We agree with Judge Mishler that the agents' testimony would have been irrelevant to the issues in this case. The question of whether Gallina ultimately as responsible for shipping the heroin had no bearing on whether appellant Leal knew that the heroin was hidden in the shipment she received. This is not a case like Mississippi v Chambers, 410 U.S. 284 (1973), relied upon by appellant, where the trial court excluded plainly exculpatory evidence. On the contrary, the testimony sought here was simply irrelevant.

Leal's remaining claims do not require extended discussion. There is no merit to Leal's claim that she was deprived of a fair trial because of Judge Mishler's refusal to grant a mistrial on the ground of bias. No comment made by Judge Mishler in the presence of the jury suggested that he was prejudiced against appellants' case, United States v Robinson, 635 F.2d 981, 984-85 (2 Cir. 1980), or constituted anything more than Judge Mishler's fulfillment of his obligation to insure actively that the trial was conducted fairly. United States v Curcio, 279 F.2d 681 (2 Cir.), cert. denied, 364 U.S. 924 (1960). Even the comments made outside the presence of the jury revealed nothing more than a spirited give and take

between the court and counsel. United States v Weiss, 491 F.2d 460 (2 Cir. 1974), cert. denied, 419 U.S. 833.

We hold that Judge Mishler's imposition of 5 years special parole under Count 2 of the indictment was proper. 21 U.S.C. §960(c) (1976).

Finally, we hold that the claims raised by appellant Fincato also are without merit. Fincato was in no way deprived of rights guaranteed by the Sixth Amendment as a result of Andrew Ania's testimony or his counsel's refusal to cross-examine Ania. Our review of the record discloses no actual conflict between counsel's representation of Fincato in this matter and his representation

of Ania in prior civil matters. United States v Alberti, 470 F.2d 878, 881 (2 Cir.), cert. denied, 411 U.S. 919 (1972). If such a conflict were even arguably present, the proper course would have been for counsel to attempt cross-examination and obtain a ruling from the bench or a waiver on privilege questions, or to retain co-counsel to cross-examine Ania. Having failed to do any of these things appellant cannot now claim that his Sixth Amendment rights were violated. United States v Jeffers, 520 F.2d 1256 (7 Cir. 1975). Counsel's refusal to cross-examine must be regarded as a tactical decision, and not ineffective assistance, especially in light of the fact that Troia's

counsel, who had no conflict, also declined to cross-examine Ania.

The admission of a bill of lading that Fincato shipped the heroin-laden packages was proper under the business records exception to the hearsay rule. Fed.R.Evid. 803(6); United States v Colyer, 571 F.2d 941, 947 (5 Cir. 1978). In any event, the fact that the information in the bill of lading was corroborated by documents in appellant's possession removes any question that the bill of lading was not trustworthy or that appellant may have been prejudiced by its admission.

Finally, the court's decision limiting the amount of testimony read in response to a very specific jury

request was not an abuse of discretion. United States v Desist, 384 F.2d 889 (2 Cir. 1967). The testimony which appellant Fincato sought to have read was only marginally relevant to the request. Judge Mishler's interpretation of the request clearly was reasonable.

The mandate shall issue forthwith.

WILLIAM H. TIMBERS
UNITED STATES CIRCUIT JUDGE

THOMAS J. MESKILL
UNITED STATES CIRCUIT JUDGE

THOMAS F. MURPHY
UNITED STATES DISTRICT JUDGE
Sitting by Designation